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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

GEORGE RAMSEY, LEON NUNLEY, d/b/a LEON NUNLEY COAL COMPANY; PAUL GIBBS, d/b/a PAUL GIBBS COAL COMPANY; LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis and J. H. GRAHAM, d/b/a NINTH WEST COAL COMPANY; A & R COAL COMPANY, INC.; W. T. MORRISON and J. H. GRAHAM, d/b/a M & G COAL COMPANY; J. H. GRAHAM COAL COMPANY, INC.; W. T. MORRISON and LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis, d/b/a M & T COAL COMPANY; STEPHENSON BROTHERS COAL COMPANY, INC.; EDWARD NUNLEY, d/b/a EDWARD NUNLEY COAL COMPANY; EAST VALLEY COAL COMPANY, INC.; ELLIS WARD and LON L. VARNELL, d/b/a TRACY CITY COAL COMPANY; HENRY WILLIS FLYNN, d/b/a WILLIS FLYNN COAL COMPANY; H. W. FLYNN COAL COMPANY, INC.; HOWARD HIGGINS, d/b/a HOWARD HIGGINS COAL COMPANY; HOWARD HIGGINS COAL COMPANY, INC.; MARSHALL MEEKS; TENNESSEE PRODUCTS AND CHEMICAL CORPORATION,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice
and the Associate Justices of the
Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered September 26, 1969, with petition to rehear denied December 16, 1969, in identical Cases No. 17,878 and No. 17,879, styled respectively George Ramsey; Leon Nunley, d/b/a Leon Nunley Coal Company; Paul Gibbs, d/b/a Paul Gibbs Coal Company; Lois Hall Travis, Administratrix of the Estate of W. J. Travis and J. H. Graham, d/b/a Ninth West Coal Company; A & R Coal Company, Inc., W. T. Morrison and J. H. Graham, d/b/a M & G Coal Company; J. H. Graham Coal Company, Inc.; W. T. Morrison and Lois Hall Travis, Administratrix of the Estate of W. J. Travis, d/b/a M & T Coal Company; Stephenson Brothers Coal Company, Inc.; Edward Nunley, d/b/a Edward Nunley Coal Company; East Valley Coal Company, Inc.; Ellis Ward and Lon L. Varnell, d/b/a Tracy City Coal Company; Henry Willis Flynn, d/b/a Willis Flynn Coal Company; H. W. Flynn Coal Company, Inc.; Howard Higgins, d/b/a Howard Higgins Coal Company; Howard Higgins Coal Company, Inc.; Marshall Meeks, Plaintiffs-Appellants v. United Mine Workers of America (herein called "UMW"), Defendant-Appellee, and Tennessee Products and Chemical Corporation, Plaintiff-Appellant v. United Mine Workers of America, Defendant-Appellee, wherein the Sixth Circuit affirmed judgments of the United States District Court for the Eastern District of Tennessee, Southern Division, entered March 9, 1967, against petitioners and in UMW's favor, dismissing the complaints filed in these cases.

A certified record in said cases, including proceedings in both the District Court and Court of Appeals, is furnished herewith, in accordance with this Court's Rules.*

OPINIONS BELOW

The opinion filed by the Court of Appeals September 26, 1969, appears in Appendix A hereto; it appears in the certified record; and it appears in 416 F.2d 655. The opinion of the District Court is in 265 F. Supp. 288.

JURISDICTION

The judgment of the Court of Appeals affirming the Trial Court's judgment was entered September 26, 1969, and the Court overruled petition to rehear on December 16, 1969. This Court's jurisdiction is invoked under 28 U.S.C., Sections 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

These suits were instituted to recover damages under the Sherman and Clayton Acts and jurisdiction of the District Court was based on 15 U.S.C., Section 15.

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*The record in this case as stipulated includes the printed appendix filed in the Court of Appeals by the petitioners (three volumes with page numbers followed by the letter "a"), the printed appendix filed by United Mine Workers (three volumes with page numbers followed by the letter "b") and the small printed volume entitled "Supplementary Appendix for Plaintiffs-Appellants," Pages 1124a-1191a, plus the proceedings in the Court of Appeals. All references herein are to pages in the three volumes of printed appendix filed by petitioners wherein the page numbers are followed by the letter "a".

QUESTIONS PRESENTED

1. When the District Court, sitting without a jury, found that a preponderance of evidence derived from the clearly authorized acts of UMW's international officers proved an implicit agreement with business groups violating antitrust policy, was the Court in error in entering judgment for UMW because these clearly authorized acts proved the existence of the agreement only by a preponderance of evidence, holding that the standard of "clear-proof" in Norris-LaGuardia Act's Section 6 must be applied not only to authorization or ratification of particular acts, but also to ultimate conclusions which are to be drawn from those acts in an antitrust case against a union (the Court of Appeals being divided four to four on this question after considering it in banc)?

2. When 82% of the industry, having hundreds of bargaining units, has been signed up under the 1950 National Bituminous Coal Wage Agreement and its later amendments with uniform terms that have become impossible of performance for most companies in the country and for all companies in the Southeastern Tennessee Field, and when the major industry units have demanded and received from UMW a written agreement restricting UMW to future bargaining only on national contract terms, is this restraint valid under the Sherman Act simply because, under UMW's contention adopted by the District Court, the restraint can be construed to apply to future agreements only with the units in the 82% of the industry (including petitioners) already under the 1950 National Bituminous Coal Wage Agreement as Amended and not to the 18% of the industry not yet organized under the contract?

3. When a national labor contract, with repeated flat increases of rates for all jobs in the same amount, is not

only destroying competition but is also forcing all companies to mechanize to the hilt or be destroyed, resulting in two-thirds of the men losing their jobs, was the Court right in holding the national contracting arrangement was legal because of the general right extended to unions to make labor contracts under National Labor Policy without any consideration at all of National Policy on Employment (U.S.C., Title 15, Chapter 21, Sections 1021 et seq.)?

STATUTES INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2); Sections 4 and 6 of the Clayton Act (15 U.S.C. 15, 17); Section 20 of the Clayton Act (29 U.S.C. 52); Sections 2, 4 and 6 of the Norris-LaGuardia Act (29 U.S.C. 102, 104 and 106); the Labor-Management Relations Act (29 U.S.C. 141, 151, 157 and 158(b) and (e)); and the Employment Act (15 U.S.C. 1021, 1022, 1024(a), (b) and (c)).

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners, Ramsey, et al, were coal mining companies who operated in the Southeastern Tennessee coalfield. They joined as plaintiffs in filing this case against United Mine Workers of America on January 6, 1961 (2a). The suit was brought for damages under Sections 1 and 2 of the Sherman Act. On January 6, 1965, pursuant to permission granted by the Court, petitioners filed a supplemental complaint bringing the later years through 1964 into the damage period covered by the case (5a).

This case was tried by the District Court in Chattanooga sitting without a jury in the fall of 1965. The Court filed

its opinion, containing findings of fact and conclusions of law, on March 4, 1967 (61a-167a) 265 F. Supp. 388. Final judgment dismissing the case in accordance with the opinion of the Court was entered March 9, 1967 (168a). The appeal of these parties was Case No. 17,878 in the Court of Appeals.

Another coal producer in the Southeastern Tennessee field had filed a separate case against UMW with the identical theory as this case in the same court, this being petitioner Tennessee Products and Chemical Corporation (46a). On December 5, 1966, by an agreed order, the Tennessee Products and Chemical Corporation case was submitted to the Court for adjudication on the issue of liability upon the trial record made in the instant case (58a). The opinion of the Trial Court included both cases and Tennessee Products and Chemical Corporation also appealed from the final judgment entered against it, its appeal being Case No. 17,879 in the Court of Appeals.

The Court of Appeals combined these cases for hearing before a three judge panel and after entry of the three judge decision covering both cases favorable to petitioners and reversing the judgment below, and after filing of a UMW petition to rehear in banc the full Court, without further argument or answer on UMW's petition, filed its opinion covering both cases on September 26, 1969, overruling the three judge panel and affirming the judgment below, the Court being equally divided four to four on this decision and two opinions being filed. The Court overruled petition to rehear by these petitioners on December 16, 1969, with a three judge dissenting opinion being filed on that action.

The theories of the parties and the issues in this case are set forth in the Pre-Trial Order as well as in the

Opinion of the Trial Court (12a-20a, 63a-66a). In summary, the petitioners contended that commencing in 1950 UMW engaged in a conspiracy with business groups, the major coal producing companies of the country, to control the coal industry in the Southern Appalachian coalfields, to eliminate and suppress competition, to boycott the petitioners and others engaged in coal mining, to control the market and to fix and control prices and otherwise create a monopoly. The principal part of the theory was that the conspiracy called for the imposition of the National Bituminous Coal Wage Agreement of 1950 as it was negotiated and amended from time to time by UMW and major coal companies, upon all companies in the industry, including the smaller companies and including petitioners, even though it was impracticable or impossible for those companies to abide by the terms.

The opinions of the Supreme Court in *Pennington v. United Mine Workers*, 381 U.S. 657 (1965), pronounced legal principles applicable to this case. The Supreme Court opinion, written by Mr. Justice White, with whom Mr. Justice Brennan and the Chief Justice joined, said, in part:

"We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the anti-trust laws could be made out on evidence limited to such union behavior.[2]

"[2]Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some of the employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy."

The Trial Court (as did the Trial Court in the second *Pennington* trial, 257 F. Supp. 815, affirmed 400 F.2d 806) placed almost exclusive emphasis on the foregoing language, but it is to be noticed that the above quoted footnote had not gotten to the specific question of *industrywide* bargaining by one bargaining unit where there are hundreds of units in the industry.

We do not believe the Court meant to say the union may abandon good faith bargaining in all the other units as this would frustrate one prime purpose of National Labor Policy as well as antitrust policy. We believe the ensuing language about attempts by one bargaining unit to settle matters for an entire industry needs to be given more than a secondary consideration, because this record establishes clearly such an attempt resulting in more than a decade of industrywide uniform contracts without any deviation allowed in the other units. But that part of the opinion has been virtually stripped of meaning in the later cases.

In the *Pennington* case Mr. Justice Douglas, joined by Justices Black and Clark, filed a concurring opinion the language of which has never been applied in, and has been criticized as contradictory and meaningless by, the Trial Courts in this case and in the second trial of *Pennington*.

B. The Decision of the Trial Court Sitting without a Jury.

The opinion of the Trial Court in this case makes an analysis of the Supreme Court opinions in *Pennington* and summarizes those opinions as follows:

> "By way of summary, while Justice White would require proof of the conspiracy between the union and the favored employers, he would appear to require no proof that the purpose was to put other employers out of business. On the other hand, Justice Douglas would require

that it be made to appear that the agreement was 'made for the purpose of forcing some employers out of business,' but he would hold that any industry-wide collective bargaining agreement setting a wage scale that exceeded the financial ability of some employers to pay creates a prima facie case of conspiracy. Neither the per se rule of Justice White nor the prima facie rule of Justice Douglas appears to have received the support of a majority of the Court" (78a). (265 F.Supp. at 399)

At another place the Trial Court said:

"Moreover, to suppose that national collective bargaining can or will be conducted with other than major producers of an industry is a theory unrelated to the hard realities of a competitive economy. To suppose that major operators can or will be the guardians or protectors of the small and weak in the industry in such national bargaining is also largely a theory unlikely to relate to the realities of a competitive economy.

"The problems posed to the small and medium sized enterprises by the practice of national collective bargaining would appear real and substantial. However, that their solution lies in the federal antitrust laws as now enacted by Congress is doubtful." (153-4a) (265 F.Supp. at 433)

Not anticipating the above quoted rejection of the Sherman Act, petitioners went to trial with confidence in the latter part of Mr. Justice White's opinion and Mr. Justice Douglas' opinion in *Pennington*. There was not available evidence in the form of confessions by the alleged conspirators that they were in a predatory frame of mind when they did what they did (although there was direct evidence they were trying to stabilize prices). But that

sort of evidence is lacking in most Sherman Act cases because it is hard to get any witness to confess to being willfully predatory.

A central part of the contentions of petitioners was that UMW repeatedly negotiated amendments to the National Contract with Bituminous Coal Operators Association (BCOA), a bargaining association that represented major companies in the northern coalfields. These contracts were then applied by the union to all other bargaining units with disastrous results to all companies in the Tennessee fields, and repressive effects to competition in most of the industry elsewhere. And, on December 3, 1958, UMW and BCOA negotiated the "Protective Wage Clause" as an amendment to the 1950 National Bituminous Coal Wage Agreement. It was the contention of petitioners that this Protective Wage Clause was violative of antitrust policies as expressed particularly in the opinion of Mr. Justice White in *Pennington*. The Protective Wage Clause is fully set forth in Appendix C, post, and at 1105a-1111a. The implementation of this Clause did not take place until after the end of the period involved in the *Pennington* case, so the clause was only fleetingly referred to on the *Pennington* appeal previously in this Court.

It is settled in this record that it was the business group with whom UMW negotiated that demanded the restraints on UMW's bargaining policy contained in the 1958 Protective Wage Clause (1029a). This was a clause inserted by amendment into the 1950 contract and the first part of that clause reads:

> "The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the in-

tegrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows.

"A. During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto" (1105a-1106a).

These provisions were followed by a provision for a oycott of coal of non-complying producers in Paragraph and by later paragraphs that established a tribunal to olice the carrying out of the clause and to conduct inestigations and trials with respect to violations either n the side of the union or the operators.

As found by the Trial Court the petitioners and the her companies of Southern Tennessee were under the

national contract, including this Protective Wage Clause. These companies (as related below) found the contract was impossible. They tried to get UMW to modify the terms to be more practical for the various methods of production used in the peculiar Tennessee Field but UMW would allow only national contract terms. The inability to reach a contract resulted in the strike that was still going on at the time of trial (141a). (265 F.Supp. 428)

The Trial Court went along with UMW's contention, that once a bargaining unit agreed to the national contract it was fair and legal for the major companies to insist that the union keep that unit under the national contract and not modify the terms when it later sought to get out from under it so that unit could continue to compete. Having established this proposition, UMW contended that Paragraph A of the Protective Wage Clause should be construed to mean that the restraints on UMW's contracting policy were to apply only with respect to employees (and as a consequence, only with respect to units of employers) who were already under the contract. In other words it was contended that the language "covered by this contract" in the first sentence of Paragraph A modifies the word "employees" and not "wages, hours or other conditions of work." The Trial Court as well as one of the four judge groups on the Court of Appeals went along with this proposition.

The Trial Court said:

> "It is the position of the U.M.W. that, just as the operators who signed the agreement committed themselves under the provisions of Paragraph B not to evade or debase the labor standards set out in the agreement by subcontracting the purchase of coal produced at substandard levels or subleasing coal lands where the re-

sult would have different consequences, so the Union assured operators who were signatory to the agreement that it would not enter into or permit any agreement governing labor standards 'applicable to employees covered by this contract' on any basis other than those specified by the contract. Under this construction of the clause there would be no forfeiture of the Union's exemption under the antitrust laws in accordance with the above language of the Supreme Court in the *Pennington* case.

"The Court is thus confronted with a construction of the meaning of the language used in Paragraph A of the Protective Wage Clause. The language used is not without ambiguity. The plaintiffs in effect concede as much when they state, 'While the sentence does not affirmatively state that the Union will take this contract and force it on all other bargaining units,' the language can only mean just that.

"The law is well settled in this regard that where two constructions of a written contract are reasonably possible, preference must be given to that one which does not result in a violation of law. *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686, 75 L.Ed. 1349, 51 S. Ct. 578; *Perry Coal Co. vs. N.L.R.B.*, 284 F.2d 910; *Williston on Contracts*, Sec. 236. Applying such a rule of construction to the language of Paragraph A of the Protective Wage Clause, it appears that should the language be given the construction contended for the plaintiffs, a violation of law would result, whereas should the construction contended for by the defendant be given, no violation would occur. The Court must accordingly adopt the latter construction and conclude that the Protective Wage Clause did not by its terms forfeit the Union's exemption from the

antitrust laws. Upon this same issue the United States District Court, upon retrial of the *Pennington* case, reached the same conclusion with respect to the proper construction of the Protective Wage Clause. See *Lewis v. Pennington*, 257 F.Supp. 815 at 862 (D.C. E.D. Tenn., 1966).

"Having concluded that the Protective Wage Clause does not constitute an express commitment upon the part of the U.M.W. to the B.C.O.A. not to bargain with any other coal operator upon any terms other than the national contract, this does not conclude the issue of whether the U.M.W. did in fact, though not expressly, so contract with the B.C.O.A. Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U.M.W. did so impliedly agree. However, the standard of proof where a labor union is involved is 'clear proof,' as required by Section 6 of the Norris-LaGuardia Act, a standard different from the ordinary civil burden of persuasion. *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 91 L.Ed. 973, 67 S. Ct. 775; *United Mine Workers v. Gibbs*, 383 U.S. 715, 16 L.Ed.2d 218; 86 S. Ct. 1130. The Court is of the opinion that the evidence upon the record in this case does not establish such clear and unequivocal proof as to warrant the Court in finding that the U.M.W. pursued its policy of uniformity of wage and labor standards by agreement with one or more employers, as distinguished from pursuing such policy upon its own. The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer" (106a-108a) (265 F.Supp. 411-2).

Thus the Trial Court negated any controlling significance in the case of the opinion of Mr. Justice White in *Pennington*.

Also, petitioners relied on proof of the effects and necessary consequences of the course of conduct of UMW and BCOA in designing and applying national contracts in the industry, a factor emphasized by the opinion of Mr. Justice Douglas in *Pennington*.

It is established in the record by UMW's president that 82% of the industry was organized under the national contract (332a). With respect to the industry generally throughout the country in the decade since the 1950 National Contract came into being the Trial Court found:

> ". . . During the decade between 1949 and 1959, the loss in the share of the market experienced by the large mines (No. 1 mines) in the period just prior to 1949 was reversed and their share of the market increased from 29.3% in 1949 to 49.9% in 1959. Likewise, the profitableness of coal mining appears definitely to have favored the larger producers by 1959. It appears that in 1959 Peabody Coal Company and Consolidation Coal Company, together, realized a net $43,000,000, while the rest of the industry suffered a net loss of $12,500,000" (102a) (265 F.Supp. 409).

The Court also found:

> "Employment in the industry has fallen from 416,000 men in 1950 to approximately 180,000 men in 1959 and to approximately 130,000 men in 1964" (101a).

With respect to the *effect* of the National Bituminous Coal Wage Agreement in the Southeastern Tennessee coalfield the Trial Court made the following findings:

"Upon review of the evidence as it relates to the Southeastern Tennessee coal field and of the U.M.W.'s activities therein, the following conclusions appear to be clearly supported by the evidence:

"(1) To operate successfully the producers in the Southeastern Tennessee coal field must be able to compete and survive on the T.V.A. coal market. Since 1954 50% or more of all coal produced in the State of Tennessee has had to find its market with the T.V.A. That figure reached as high as 78% in 1956 and by 1962 was still at 64.3%.

"(2) Due to the geological conditions, the Southeastern Tennessee coal field cannot achieve a level of productivity equivalent to that of its principal competitors on the T.V.A. coal market. This competitive disadvantage is offset in part by the transportation and quality advantages which the field has over its principal competitors in the T.V.A. market at the Widow's Creek steam plant.

"(3) In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the T.V.A. coal market under the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to antiquated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business" (146a-147a) (265 F.Supp. 430).

As stated above, the companies in Southeastern Tennessee had signed the National Contract including the 1958 amendment with the Protective Wage Clause. These companies in 1962-1963 tried hard to get UMW to modify the National Contract terms so as to fit all the various methods of operations in the field, ranging from hand mining to the most advanced mechanization, but UMW refused to agree to anything but the flat National Contract terms. The Trial Court found that the failure to reach a working agreement was the reason for the strike starting December 26, 1962, which was still going on at the trial of this case (140a-1a) (265 F.Supp. 427-9). As to this strike, the Trial Court found:

> "The strike, which commenced on December 26, 1962, was accompanied by mass picketing at the road junctions leading to the major mine areas in the field. This strike was still continuing in 1965 at the time that proof was taken for this trial. The U.M.W. has continued support of the strikers by relief payments. Grundy Mining Company (a Tennessee Consolidated subsidiary) did not operate again until October 8, 1963, although it attempted to open in May of 1963 but was prevented from doing so by mass picketing. By February of 1963 all mines on Tennessee Products property had ceased operation due to the strike. No mining on these properties had been resumed by 1965. A great deal of violence, bloodshed and destruction of property has accompanied the strike. Much suffering, deprivation and want has occurred. The Southeastern Tennessee coal field remains a blighted area . . ." (141a-2a) (265 F.Supp. 428)

The Trial Court was unable to apply these findings of results of national contracting because of the second footnote of Mr. Justice White's opinion in *Pennington*. The

Trial Court declared the opinion of Mr. Justice Douglas (joined in by Justices Black and Clark) was contradictory of that footnote, saying "To hold that a union, in doing what it lawfully is entitled to do thereby creates a prima facie case of illegal activity is a contradiction of terms" (77a) (265 F.Supp. 398).

The Trial Court considered that the decision of this court in *Gibbs v. United Mine Workers*, 383 U.S. 715 meant that every ultimate conclusion of law and fact in a case against a labor union, not just questions as to agency or authorization, must be proved by clear, unequivocal and convincing proof, and the Trial Court concluded that the proof did not manifest a union-businessmen combination to achieve a predatory anti-competitive end, the Court adding:

> "Did not the clear evidence rule apply, the Court might have reached a different conclusion on certain issues. Likewise, did the prima facie rule, as announced by Justice Douglas in the *Pennington* case apply, a different view of the evidence would have been required" (157a) (265 F.Supp. 434-5).

C. The Opinions of the Court of Appeals

A panel of three judges heard the argument in this case in the Court of Appeals. That panel reversed the judgment in the District Court and remanded the case for a new trial in a two to one decision with a dissenting opinion on April 8, 1969.

UMW filed a petition to rehear in banc. Petitioners were not requested to answer the petition under Rule 40(a), Federal Rules of Appellate Procedure. There was no argument to the Court in banc.

On September 26, 1969, the Court in banc filed two opinions in which the Court was equally divided, four to four. The opinions are prefaced by this statement:

> "After consideration of these appeals by a panel of this court, rehearing en banc was granted. Upon rehearing, the court was evenly divided as to affirmance or reversal of the District Court. Accordingly, the judgment of the District Court stands affirmed."

Judge Edwards, joined by Chief Judge Phillips and Judges Peck and Combs, wrote the opinion favoring UMW. This opinion recited that the Protective Wage Clause of the 1958 Amendment could be construed as not requiring UMW to impose the contract on the part (18%) of the industry that was not signatory to the national contract. These judges assumed that this made the restraint legal. The opinion does not consider the legality of the restraint clearly expressed at least as to the units (82%) under the national contract with respect to future efforts to modify the terms. The opinion simply says that when the 1950 National Contract amendment of 1958 said, "During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract—this could be construed to be "limited in its effect to its signatories." The opinion points out that in the Second Pennington appeal the Court of Appeals also said, "We agree with the District Judge that the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on the nonsignatory employers."

Petitioners had contended in the Court of Appeals:

"Even if this contention were correct, we see little difference in result considering the prior history of imposing the national contract which was being amended and the fact that plaintiffs-appellants were covered by the national contract and subsequently they were signed up under the 1958 amendment. It was thereafter that these contracts were cancelled (by UMW) and they were unable to get UMW to make any change in the contract terms. UMW simply demanded guarantees of performance." (Brief of Petitioners in Court of Appeals, p. 31)

But there was just no analysis of the legality of the clause as to the units in the organized 82% of the industry, either in the Trial Court or Court of Appeals.

Judge Edwards' opinion goes on to consider the finding of the Trial Court that a preponderance of the evidence showed an implicit agreement by UMW to bargain with *anyone* only on National Contract terms. His opinion says:

"There is, of course, no doubt that the agreement between the UMW and the BCOA containing the Protective Wage Clause was the action of fully authorized agents. Defendant UMW concedes this and as to this phase of the case, the standard of proof whether 'clear proof' or 'preponderance of the evidence' would make no difference.

"But Judge Wilson found, and we have found, that the language of the agreement did not per se constitute an illegal conspiracy. Plaintiffs also charged, however, that such a conspiracy could be appropriately implied by the District Court from the BCOA-UMW contract, plus the subsequent actions of the UMW offi-

cers and members in the organizational and strike activities in the Southeastern Tennessee coalfields and in defendant's purchase of stock in West Kentucky Coal about which plaintiffs-appellants complain. The history and the specific language of the Norris-LaGuardia Act indicate that its 'clear proof' standard was designed to apply to just such charges as these."

What is wrong with this last paragraph is that it does not concentrate on the real question: What part of the record or evidence was it that made the ***trier of fact, the trial judge, find*** that the preponderance of the evidence proved a strait-jacket agreement by UMW? Rather this paragraph suddenly jumps off on what ***plaintiffs charged*** in other phases of the case concerning, not the Washington sessions of UMW and BCOA on the national scene, but concerning the conspiracy to take over the TVA market.

The real governing questions at this point would be: Did the trial judge have in mind and did he consider the "actions of the UMW officers and members in the organizational and strike activities in the Southeastern Tennessee coalfields" in finding that a preponderance of evidence showed that UMW and BCOA sitting in Washington had come to a tacit strait-jacket understanding for the industry as a whole and on the national level? We think obviously he did not, and we say this because the Trial Court's opinion is divided into very definable and labeled sections and the sections that pertain to this conclusion of the Trial Court indisputably are those labeled "Collective Bargaining Following 1950" and "The Protective Wage Clause" (265 F. Supp. 407-412). The Court made the conclusion stated above concerning preponderance of the evidence at the end of these sections. Then it immediately turned to another subject "apart from the collective bargaining activities of UMW during the decade of the 1950's" and this involved

the purchase of stock in West Kentucky Coal Company, etc. So there can be no question of what proof the trial court was weighing in finding there was a preponderance of evidence.

The next question would be: Are there any of the circumstances that he did consider in this part of his opinion upon this question which would call for the "clear-proof" standard any more than the question of whether "the Protective Wage Clause was the action of fully authorized agents" (about which there is agreement in the Court of Appeals that "clear-proof" is unimportant). Obviously there are no such circumstances because the Trial Court's attention is entirely devoted to the course of bargaining for the national contracts after 1950 through the 1958 contract including the Protective Wage Clause which was in effect in the period of this case, and the Court considered the adverse effects on the smaller or marginal producers and the beneficial effects on the major producers, considering both from an *industry-wide* point of view. ***There can be no more question that the duly authorized international officers of UMW were in control of this national bargaining and its effects than there can be about who was responsible for the Protective Wage Clause.*** The "clear-proof" rule is unimportant to both because there can be no question of "authorization, ratification or participation in" what was going on in the sessions between UMW and BCOA.

The opinion favoring petitioners in the Court of Appeals was written by Judge O'Sullivan, with whom Judges Weick, Celebrezze and McCree joined. This opinion also did not consider the legality of the Protective Wage Clause if it be construed as a restriction on future bargaining only on the organized 82% of the industry. It apparently assumes the legality of such a provision and turns to the findings of the Trial Court concerning "preponderance of evidence."

Judge O'Sullivan said:

"The question of law which divides us in this case is whether Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, requires that all elements of a cause of action for antitrust violation must be made out by 'clear proof' where a labor union is a defendant, as my brother Edwards holds, or whether the 'clear proof' standard of Section 6 is limited to the determination of the authority of 'individual officers, members, or agents' to act for a labor union or other organization, as I contend."

He goes on to say:

"It is clear that had the District Judge considered that the ordinary preponderance of the evidence rule applied, he would have found that the United Mine Workers were guilty of Sherman Act violations."

Judge O'Sullivan points out that there was no question of authorization of the acts complained of in this case:

". . . In the case at bar, except as to responsibility for violence, there was no issue as to whether what was done by the Mine Workers' officers or agents had the approval of the union. No such question was raised. The National Bituminous Coal Wage Agreement and the 1958 Protective Wage Clause made between the Bituminous Coal Operations Association and the United Mine Workers were admittedly executed by the proper authorities of the union and Norris-LaGuardia was in no way involved in these critical matters."

Judge O'Sullivan turns to the language of Mr. Justice White's opinion in *Pennington* upon which UMW and Judge Edwards have so strongly relied—"But we think a union forfeits its exemption from the antitrust laws when it is

clearly shown that it has agreed . . . ." (381 U.S. at 665; emphasis added). Judge O'Sullivan said:

> "We are not persuaded that the context of Mr. Justice White's use of the words 'clearly shown' in the sentence quoted justifies their being read as announcing a new rule giving labor unions special treatment in defending suits under the Sherman Act. The concurring opinion of Mr. Justice Douglas, joined by Mr. Justice Black and Mr. Justice Clark, does not even discuss the subject. Neither does Mr. Justice Goldberg, who was joined by Mr. Justice Harlan and Mr. Justice Stewart in dissenting from *Pennington* II.
>
> "That the words 'clearly shown' were not employed by Justice White to announce the rule claimed by Judge Taylor in *Pennington* II and by Judge Wilson in this case is made clear by the fact that neither in Justice White's opinion nor in any of the others in *Pennington* II is Section 6 of Norris-LaGuardia even mentioned. It is that statute which is the sole basis for the claim that 'clear proof' is the standard applicable to the burden of proving all elements of a labor union's violation of the Sherman Act.
>
> ". . . The 'clear proof' rule was created by Congressional Act, with clear definition of its limited application. We are not at liberty to do violence to its plain language by reading into it new and special antitrust insulation of labor unions not contained in the exemption granted them by the Clayton Act. Certainly the *Gibbs* case did not do so, and so we are not persuaded that two words included in a general observation by one of the Justices in *Pennington* II did so."

Judge O'Sullivan then turned to the broader charges of conspiracy having to do with the competition for the TVA

market and union investments in, and financial assistance to, major companies competing with petitioners for, and quadrupling their share in that market, and his opinion says:

> "There is nothing in the record of this case to suggest that the conception and prosecution of the grand plan we deal with was the work of irresponsible underlings. The total enterprise was directed from high echelons of authority. Top people of the United Mine Workers and the Bituminous Coal Operators Association did not need the protection of Norris-LaGuardia when they negotiated and signed the National Bituminous Coal Wage Agreement and its Protective Wage Clause, nor when the Mine Workers invested $25,000,000 to aid the big coal companies to fulfill the promise of the plan.
>
> "Peace has indeed come to Southeastern Tennessee's part of Appalachia, but it is the peace of obedience to the overlords of big business and big labor."

REASONS FOR GRANTING THE WRIT

I. This Case Presents a Construction of the Norris-LaGuardia Section 6 Clear-Proof Rule That Requires a Fact-Finder to Excuse a Union for Unlawful Conduct Established by Clearly Authorized and Clearly Proven Conduct of Its Highest Officers.

In dealing with the effect of Section 6 of Norris-LaGuardia in an antitrust case the Supreme Court said:

> "The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages and working conditions may well be sufficient to make the union liable . . . and the custom or tradi-

tional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union." *Carpenters v. United States*, 330 U.S. 395, 410.

Under such language as this the "clear-proof" standard can hardly be found to be anything but a rule of *proof of agency*. The Congress so considered it the only time it has dealt with it since it was passed. When Congress made Section 6 inapplicable to suits against labor unions under Taft-Hartley, the provision was treated as a rule of agency. 29 U.S.C.A. Section 185(e). See U. S. Code Congressional Service, 80th Congress, First Session, 1947, Pages 1172-3. It is not a rule of substantive law affecting conclusions as to what clearly authorized acts mean under the law. Stretching the congressional language like this does not serve the interests of justice in whose eyes all are equal. None should come before the bar with an artificially or legislatively contrived handicap for or against them—unless there is "clear proof" that Congress wanted it that way.

II. This Case Presents a Construction of the Sherman Act Which Permits the Dominant Business Group and the Dominant Union to Combine to Suppress Competition in All Units Which Can Once Be Compelled by Any Means to Sign a National Contract.

We concede that it has been established that force and violence alone do not establish a violation of the Sherman Act. But this case adds one more step in the path of domination of industries by big business and big labor. If the smaller competitors can once be corraled into the national contracting system by any means, including violence or mass picketing, then it is permissible for big business by formal contract to require the union under a

Protective Wage Clause to wipe them out by applying national contract terms which are ridiculously impossible in their situations. That is the holdings in the lower courts in this case.

This is a far cry from the decisions in *Associated Press v. United States*, 326 U.S. 1; *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457; and *Anderson v. Ship Owners Association*, 272 U.S. 359, 363-5, upon which Mr. Justice White relied in his opinion in *Pennington*.

III. Not Only Is Antitrust Policy Subordinated, But Also Basic Purposes of National Labor Policy and National Policy of Employment Are Frustrated, by the Lower Court Decisions; There Must Be a Judicial Reconciliation between National Labor Policy and National Policy of Employment as Well as Antitrust Policy on the Question of National Contracting.

It appears elementary that good faith collective bargaining in the various bargaining units of an industry is a principal object and purpose of National Labor Policy. It seems equally elementary that the type of "national bargaining" exemplified in this case completely frustrates that policy, in addition to the fact that it creates wholesale restraints on trade. Also it is inevitable that the local unions will fall to international union dictatorship. The pleas of local unions to the international for more realistic contracts in local situations to slow down the loss of jobs and get relief from the effects of mechanization forced by the contract have gone unnoticed in this case by the lower courts (1163a-4a, 338a-45a).

It may be presumptuous of us to suggest it, but we believe this Court should, in view of the national contracting

trend and its effects, find a judicial reconciliation between National Labor Policy and what Title 15, Chapter 21 of U.S.C.A. calls "National Policy of Employment," including the Employment Act (15 U.S.C. Section 1021 et seq.) and the reports of the Joint Economic Committee of Congress called for by that Act.

The record in this case proves conclusively (but without any consideration from the lower courts) how a national bargaining policy fitted to the largest units, compels a company, without good faith bargaining, to fire men and mechanize to the hilt or be destroyed, and this is directly contrary to the employment policies expressed in 15 U.S.C. Section 1021. As related in the Trial Court's opinion, the unemployment and economic devastation has been appalling. And the "two man bargaining teams" (as described by UMW and BCOA records, 298a, 432a) sit in judgment on the economic life of whole areas of this country.

In the very month that the Trial Court filed his opinion in this case with the above quoted views of the Sherman Act, on March 17, 1967, the Senate released the Report of the Joint Economic Committee of Congress on the January Economic Report of the President (Report No. 73, Senate, 90th Congress, 1st Session). This joint Congressional report pointed out the dangerous tendency in many industries towards increased concentration and said at pages 25-26:

> "By reducing or inhibiting concentration in such industries and increasing the role of market forces, antitrust can materially complement other public economic policies. But if antitrust enforcement is to play such a role, greater vigor and more imagination are required, for, in recent years, far too little significant action has been taken. While price-fixing,

bid rigging, and other forms of overt collusion have often been prosecuted by Federal agencies, too few cases have been brought to stem the merger tide and virtually nothing of consequence has been done to reduce the high levels of concentration in oligopolistic industries.

* * *

"If the public is to be protected under these circumstances, the only answer—and it is an unappealing one to those of us who are strong proponents of a free enterprise system—may be some sort of statutory price-wage surveillance and, perhaps, actual controls.

"Against this backdrop, the vital role of antitrust—as a means of achieving and preserving competition so that principal reliance can legitimately be placed on the market to keep prices and wages in rough conformance with changes in productivity—becomes strikingly apparent. Of course, the maintenance of competition calls for more than just antitrust enforcement: *government regulation must be shaped to encourage rather than frustrate competition*, procurement practices must not have the effect of promoting monopoly, and other *public policies must be continuously appraised with the overriding objective of further competition*. But in the last analysis antitrust enforcement must assume the primary role in increasing the competitive tone of the economy. And without a highly competitive economy, it may be impossible—without distasteful Government controls—to achieve a rapid rate of economic growth without serious and unacceptable inflation. This is why we think a more aggressive and more comprehensive program of antitrust enforcement is not only needed but is crucially related to the goals of the Employment Act." [Emphasis added.]

Obviously, if the Trial Courts are right in this case and in the second *Pennington* case, the door is wide open to big business and big labor to defeat Sherman's fundamental purposes. The Supreme Court in *Pennington* put up a road block clearly required by Sherman. If that road block can be demolished (as it has been) by the reasoning of the Trial Courts in these cases, on the kind of records made in these cases, the Trial Court is right in saying the Sherman Act means nothing so long as big business and big labor see eye-to-eye.

CONCLUSION

For the reasons assigned, petitioners pray that the Petition for Writ of Certiorari be granted and that the writ issue to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit, entered in Cases No. 17,878 and 17,879 on September 26, 1969, with Petition to Rehear denied December 16, 1969.

Respectfully submitted,

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APPENDIX A

Nos. 17878-79

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE RAMSEY, LEON NUNLEY, d/b/a LEON NUNLEY COAL COMPANY; PAUL GIBBS, d/b/a PAUL GIBBS COAL COMPANY; LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis and J. H. GRAHAM, d/b/a NINTH WEST COAL COMPANY; A & R COAL COMPANY, INC.; W. T. MORRISON and J. H. GRAHAM d/b/a M & G COAL COMPANY; J. H. GRAHAM COAL COMPANY, INC.; W. T. MORRISON and LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis, d/b/a M & T COAL COMPANY; STEPHENSON BROTHERS COAL COMPANY, INC.; EDWARD NUNLEY, d/b/a EDWARD NUNLEY COAL COMPANY; EAST VALLEY COAL COMPANY, INC.; ELLIS WARD and LON L. VARNELL, d/b/a TRACY CITY COAL COMPANY; HENRY WILLIS FLYNN, d/b/a WILLIS FLYNN COAL COMPANY; H. W. FLYNN COAL COMPANY, INC.; HOWARD HIGGINS, d/b/a HOWARD HIGGINS COAL COMPANY; HOWARD HIGGINS COAL COMPANY, INC.; MARSHALL MEEKS,

Plaintiffs-Appellants,

v.

UNITED MINE WORKERS OF AMERICA,

Defendant-Appellee.

TENNESSEE PRODUCTS & CHEMICAL CORPORATION,

Plaintiff-Appellant,

v.

UNITED MINE WORKERS OF AMERICA,

Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division

Appendix A

[fol. 2] Decided September 26, 1969.

Before: PHILLIPS, Chief Judge, WEICK, O'SULLIVAN, EDWARDS, CELEBREZZE, PECK, McCREE and COMBS, Circuit Judges.

After consideration of these appeals by a panel of this court, rehearing en banc was granted. Upon rehearing, the court was evenly divided as to affirmance or reversal of the District Court. Accordingly, the judgment of the District Court stands affirmed. The opinions of Judge Edwards for affirmance and Judge O'Sullivan for reversal, respectively are filed with this order.

EDWARDS, Circuit Judge, with whom Chief Judge Phillips and Judges Peck and Combs concur. These cases are on appeal from judgments entered in the United States District Court for the Eastern District of Tennessee, Southern Division, which dismissed the joint complaints of plaintiffs-appellants coal operators against defendant-appellee United Mine Workers.

They are the latest appeals in this circuit which present the conflicts between the national policy opposing trusts and monopolies (Sherman Antitrust Act §§ 1 and 2, 15 U.S.C. §§ 1, 2 (1964)), and the national policy favoring collective bargaining (National Labor Relations Act § 1, 29 U.S.C. § 151 (1964); Norris-LaGuardia Act §§ 1, 2 and 5, 29 U.S.C. §§ 101, 102, 105 (1964); Clayton Antitrust Act §§ 6 and 20, 15 U.S.C. § 17 (1964), 29 U.S.C.
[fol. 3] § 52 (1964)). Plaintiffs are coal operators in Southeastern Tennessee who allege that defendant, United Mine Workers of America, entered into a

national conspiracy with certain major coal producers to create a monopoly, to suppress competition, and to drive plaintiffs (and other marginal operators) out of business.

At the outset we note that of all the major coal companies, whose economic interests defendant is alleged to have conspired to serve, none were joined as co-defendants at trial.

In all controlling respects the issues presented by these appeals are identical with the major issues in the *Pennington* cases which have been the subject of original trial, judgment, and affirmance by this court, *Pennington v. United Mine Workers*, 325 F.2d 804 (6th Cir. 1963) reversal and remand by the United States Supreme Court, *Pennington v. United Mine Workers*, 381 U.S. 657 (1965), retrial and judgment, *Lewis v. Pennington*, 257 F.Supp. 815 (E.D. Tenn. 1966), and affirmance of judgment on retrial by this court, *Lewis v. Pennington*, 400 F.2d 806 (6th Cir. 1968), *cert. denied*, 393 U.S. 983 (1968). The opinions of Justice White in the Supreme Court remand of *Pennington*, of Judge Peck in the latest consideration of *Pennington* by this court, and the opinion of Judge Wilson, who tried these cases without a jury and entered thorough findings of fact and carefully reasoned conclusions of law, *Ramsey v. United Mine Workers*, 265 F.Supp. 388 (E.D. Tenn. 1967), should serve to foreshorten our appellate consideration.

Appellants present three questions before this court:

1. Does the Sherman Act place any restraints on national collective bargaining?

2. Should the court have found there was an agreement between UMW and BCOA that uniform labor terms would be imposed on all bargaining units throughout the industry?

[fol. 4] 3. Should the court have concluded that there was an illegal combination or conspiracy between UMW and business groups, even if the proof were insufficient to establish a specific agreement to apply uniform terms industry-wide?

Only the last two of these questions are pertinent to decision of the instant appeals. And we decline the invitation to write an advisory opinion on the first question seeking to interpret or expand on the view of the United States Supreme Court, as particularly expressed in ***Pennington v. United Mine Workers***, 381 U.S. 657 (1965); ***Allen Bradley Co. v. Local 3, IBEW***, 325 U.S. 797 (1945), and ***United States v. Hutcheson***, 312 U.S. 219 (1941).

The second issue requires us to determine whether or not the Supplemental Agreement of 1958 (the Protective Wage Clause) between the Bituminous Coal Operators Association (BCOA) and the United Mine Workers of America (UMW) constituted an express or per se violation of the antitrust laws. The specific language complained of follows:

"PROTECTIVE WAGE CLAUSE

"The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this

contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:

"A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, [fol. 5] hours or other conditions of work *applicable to employees covered by this Contract* on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

"B. It is recognized that *when signatory operators* mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree *that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement*, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

"'Procured or acquired under a subcontract arrangement' means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

"The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: Provided, however, that any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms.

[fol. 6]

"The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained, shall be a direct and continuing obligation of said Operator during the life of this Agreement.

"As a part of the consideration for this Agreement, the Operators signatory hereto agree that *this Clause covers the operation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the*

date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The said Operators agree that they will not lease, license, or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause." (Emphasis added.)

Defendant sought to persuade the District Court, and now seeks to persuade us, that this language taken in the historic context of the bargaining relationship constitutes an express undertaking by defendant to impose the BCOA-UMW wage scale on all nonsignatory coal operators in order to force some (including plaintiffs) out of business.

We simply do not find language to support this contention. The italicized portions of the disputed agreement clearly indicate that it is expressly limited in its effect to its signatories.

[fol. 7] Further, as Judge Peck recently pointed out for this court:

"[W]e agree with the District Court that the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on the nonsignatory employers. The Protective Wage Clause is capable of two reasonable constructions, and the District Court properly held that in such circumstances the construction should be adopted that does not result in a violation of law. *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686 (1931); *Perry Coal Co. v. N.L.R.B.*, 284 F.2d 910, 914 (7th Cir. 1960). We add the observation, however, that even without the operation of this principle of law we would incline to

the conclusion that the agreement did not constitute a violation of the Sherman Act, the record containing insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown." *Lewis v. Pennington*, *supra* at 814-815.

The third appellate issue is, however, such as to require greater analysis. In it plaintiffs-appellants contend that even if defendant did not make an express commitment in contractual language, it did in fact form an illegal conspiracy with BCOA to impose a wage scale upon the total industry which had the effect (and if such were needed, the predatory intent also) of driving smaller operators like plaintiffs out of business.

There is, of course, no doubt that defendant could in serving the purposes of its membership seek vigorously to impose a uniform wage scale throughout the coal industry and that in doing so its lawful labor objectives were exempt from antitrust regulation. *See American Federation of Musicians v. Carroll*, 391 U.S. 99 (1968).

In *United States v. Hutcheson*, 312 U.S. 219 (1941), the Supreme Court said:

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the [fol. 8] licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *Id.* at 232. (Footnote omitted.)

See also Clayton Act § 20, 15 U.S.C. § 20 (1964), and Norris-LaGuardia Act, 18 U.S.C. § 3692, 29 U.S.C. §§ 101-115 (1964); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

The critical questions pertaining to this issue are 1) whether defendant acted in its own self-interest or whether defendant acted in illegal conspiracy with BCOA to stifle competition; and 2) by what standard of proof this decision should be made.

One major difference between the appellate record in *Pennington* and that presented herein must be pointed out here. Both District Judges (Judge Taylor in the retrial of the *Pennington* case, and Judge Wilson in *Ramsey*) concurred in holding that the standard of proof imposed upon plaintiffs in establishing its allegations of antitrust conspiracy against defendant labor union was "clear proof" rather than "preponderance of the evidence." Judge Taylor, however, stated that on the record before him plaintiffs' proofs failed to justify judgment under either standard; whereas in the instant record Judge Wilson said:

> "Having concluded that the Protective Wage Clause does not constitute an express commitment upon the part of the U.M.W. to the B.C.O.A. not to bargain with any other coal operator upon any terms other than the national contract, this does not conclude the issue of whether the U.M.W. did in fact, though not expressly, so contract with B.C.O.A. *Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U.M.W. did so impliedly agree. However, the standard of proof where a labor union is involved is 'clear proof', as required by Section 6 of the Norris-LaGuardia Act, a standard different from* [fol. 9] *the ordinary civil burden of persuasion. United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 91 L.Ed. 973, 67 S. Ct. 775; *United Mine Workers v. Gibbs*, 383 U.S. 715, 16 L.

Ed.2d 218; 86 S. Ct. 1130. The Court is of the opinion that the evidence upon the record in this case does not establish such clear and unequivocal proof as to warrant the Court in finding that the U.M.W. pursued its policy of uniformity of wage and labor standards by agreement with one or more employers, as distinguished from pursuing such policy upon its own. The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer." *Ramsey v. United Mine Workers of America*, 265 F.Supp. 388, 412 (E.D. Tenn. 1967). (Emphasis added.)

In the second *Pennington* case Judge Peck dealt with these identical issues:

> "Plaintiffs' principle contention is that the UMW, in combination with the BCOA, agreed to impose the wage and royalty scales set forth in the National Agreement upon all operators regardless of their ability to pay. One issue presented is whether the District Court properly held 'that the *Pennington* case teaches that it is necessary to find predatory intent to drive small coal operators out of business in order to hold the employer and Union for a violation of the Sherman Act.'
>
> "In *Pennington* the Supreme Court, in an opinion by Mr. Justice White and joined by Mr. Chief Justice Warren and Mr. Justice Brennan, stated:
>
> > " 'We have said that a union may make wage agreements with a multi-employer bargaining unit and may in Pursuance of its own union interests seek to obtain the same terms from other employers. No case under the anti-trust laws could be made out on evidence limited to such behavior.

[fol. 10] But we think a union forfeits its exemption from the antitrust laws when it is *clearly shown* that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.' 381 U.S. at 665. (Footnote omitted; emphasis added.)

"As reflected by the Court's language immediately following the above statement, it appears that Mr. Justice White considered such an agreement to be tantamount to an agreement to eliminate competition:

" 'One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.' *Id.* at 665-66.

"Justice White thus says in effect that if a union and some employers conspire to eliminate some or all of the employers' competition, this is a violation of the Sherman Act even if the mechanism is the imposition of a wage scale which the union is free unilaterally to impose. It was upon this premise (that the purpose of the bargaining agreement was to drive some employers out of business), that Mr. Justice Douglas, joined by Justices Black and Clark, concurred:

" 'On the new trial the jury should be instructed that if there was an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was

made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.' 381 U.S. at 672-73.

[fol. 11] "In view of the two opinions in which a majority of the justices joined, it is here determined that the District Court's holding was correct. That court's interpretation of *Pennington* is in accord with the principle announced in *United States v. Hutcheson*, *supra* (that a union must act in furtherance of its own self-interest in order to retain immunity from the antitrust laws), and reaffirmed in *Allen Bradley Co. v. Local No. 3*, *supra*. We thus understand *Pennington* to teach that:

1) a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act;

2) 'predatory intent' (as used by Mr. Justice White (381 U.S. at 668) and by Judge Taylor) is merely shorthand, employed to describe this anti-competitive conspiracy; and

3) such anti-competitive conspiracy must be established by 'clear proof'. See also *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

"While the jury by its verdict in the first trial of this case had found a conspiracy between the UMW and large mine operators to put smaller mine operators out of business by a preponderance of the evidence, Judge Taylor found such a conspiracy not to have been shown by 'clear proof' at the second trial. Judge Taylor

properly concluded that a degree of proof less than the 'beyond a reasonable doubt' requirement in criminal cases but greater than the 'preponderance of the evidence' standard of civil actions is necessary. 257 F. Supp. at 829. The District Court's determination that judged by this standard evidence of sufficient probity had not been offered is supported by a review of the record and is not clearly erroneous. Rule 52 F.R.-Civ.P." *Lewis v. Pennington*, *supra* at 813-814.

We have previously noted that certiorari has recently been denied by the Supreme Court in relation to
[fol. 12] the second *Pennington* case from this court, which we have just quoted so fully. While we are well aware that denial of certiorari does not represent affirmance, we consider it inappropriate to discount completely the denial of certiorari in second *Pennington*. The Supreme Court had granted certiorari in relation to this court's first decision in the same case and had remanded it with instructions for retrial. If the trial court, or this court, had interpreted those instructions erroneously in the course of retrial or appeal, we find it difficult to believe that the Supreme Court would have ignored the error.

We believe that Judge Peck (and Judges Wilson and Taylor) were right in holding that the "clear proof" standard of the Norris-LaGuardia Act is the proper standard of proof applicable to a Sherman Act suit against a labor union. *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The Norris-LaGuardia Act states specifically:

"No officer or member of any association or organization and no association or organization participating

or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." Norris-LaGuardia Act § 6, 29 U.S.C. § 106 (1964).

It is, of course, impossible for a labor union to act except by dint of actions of its officers, members, or agents. Even more specifically pertinent to the standard of proof applicable to this case is the fact that this action is a claim of violation of the Sherman Antitrust Act by an illegal conspiracy to drive plaintiffs out of business on the part of the United Mine Workers. Such a conspiracy could obviously be carried out only by officers, members, or agents of the union acting in an agency relationship.

[fol. 13] There is, of course, no doubt that the agreement between the UMW and the BCOA containing the Protective Wage Clause was the action of fully authorized agents. Defendant UMW concedes this and as to this phase of the case, the standard of proof whether "clear proof" or "preponderance of the evidence" would make no difference.

But Judge Wilson found, and we have found, that the language of the agreement did not per se constitute an illegal conspiracy. Plaintiffs also charged, however, that such a conspiracy could be appropriately implied by the District Court from the BCOA-UMW contract, plus the subsequent actions of the UMW officers and members in the organizational and strike activities in the Southeastern Tennessee coalfields and in defendant's purchase of stock in West Kentucky Coal about which plaintiffs-appellants complain. The history and the specific lan-

guage of the Norris-LaGuardia Act indicate that its "clear proof" standard was designed to apply to just such charges as these.

The United States Supreme Court recognized these facts when it said in the *Carpenters'* case:

> "The indictment charges a conspiracy forbidden by the Sherman Act. On that issue, the power of the trial court is limited by § 6 of the Norris-LaGuardia Act. Note 2, supra [47 Stat. 70, 71]. The limitations of that section are upon all courts of the United States in all matters growing out of labor disputes, covered by the Act, which may come before them. It properly is conceded that this agreement grew out of such a labor dispute and that all parties defendant participated or were interested in that dispute." *United Brotherhood of Carpenters and Joiners v. United States*, 330 U.S. 395, 401 (1947).

Any reconciliation of national labor policy with national antitrust policy demands application of this interpretation in this case. Since in every instance labor unions are seeking agreements with employers on wages, hours and working conditions, and in every such instance both the employer and the union have a strong (albeit [fol. 14] separate) motive for extending such agreement to other employers in the same field, it would be simple to defeat the national policy of encouraging collective bargaining by allowing easy implication of union-employer antitrust conspiracies. *See* Mr. Justice Goldberg's dissent in *Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., Inc.*, 381 U.S. 676, 697 (1965); *see also* Senate Report No. 163, 72d Cong. 1st Sess., p. 19. Two members of the Supreme Court joined Mr. Justice White's opinion which employed the

language, "clearly shown," in describing the applicable standard of proof. 386 U.S. at 665. We also read Mr. Justice Douglas' opinion (with which two members joined) as concurring on this point.

Since we agree with this court's second *Pennington* decision (quoted above) that the "clear proof" standard applies to this appeal, we find no reason to undertake an analysis of what result would follow application of a different standard.

Further, in agreement with the reasoning in the second *Pennington* decision in this court, we believe that the Supreme Court[1] in *Pennington* has required a finding of "predatory intent." Such intent may be represented by an agreement by a labor union to serve the interests of an employer in eliminating that employer's economic competition.[2]

[fol. 15] With these two standards in mind, we turn to consideration of whether or not plaintiffs' total evidence concerning the alleged antitrust conspiracy constituted "clear proof" of such a conspiracy. As to this

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[1]While Mr. Justice Goldberg and two members of the Court would hold that collective bargaining upon wages and hours is completely free from antitrust restraint (See Justice Goldberg dissenting in **Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., Inc.**, 381 U.S. 676, 697 (1965)), this view does not appear to command a majority of the Supreme Court.

[2]The United States Supreme Court recently discussed the **Allen Bradley** case and interpreted its holding thus:

> "While recognizing that the union might have had an immunity for its contribution to the trade boycott had it acted alone, citing **Hutcheson, supra**, the Court held immunity was not intended by the Clayton or Norris-LaGuardia Acts in cases in which the union's activity was part of a larger conspiracy to abet contractors and manufacturers to create a monopoly." **National Woodwork Mfrs. Assn. v. NLRB**, 386 U.S. 612, 628 (1967).

issue we deal with a somewhat different factual record than that made in the second *Pennington* case.

The essence of appellants' evidence of conspiracy to drive BCOA's competititors out of business consisted of 1) evidence of UMW attempts to organize the Southeastern Tennessee coalfields, including the operations of appellants; 2) the claimed violent and disastrous economic impact of these activities, and 3) the purchase of substantial stock in the West Kentucky Coal Co. by the UMW and the subsequent "price cutting" activities of West Kentucky Coal which appellants assert served to drive Southeastern Tennessee coal out of the TVA market.

The District Judge's analysis of the evidence he heard is masterly. His opinion covers 52 pages of volume 265 of Federal Supplement and while we affirm it for purposes of our decision on the facts, in view of its ready availability we shall quote from it selectively.

Briefly put, the District Judge found in essence that 1) the UMW in its organizing activities in the Southeastern Tennessee coalfields was pursuing its own and its own members' interests rather than those of the BCOA; 2) appellants' economic troubles stemmed as much (or more) from the geological structures of the Southeastern Tennessee coalfields which made mechanization of the mines to meet oil, gas and electrical competition difficult and from undercapitalization and bad management as they did from the activities of the UMW, and 3) that the total record did not support the charge that defendant conspired with West Kentucky Coal so as to engage in predatory price cutting in the TVA market.[3]

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[3]We note here that West Kentucky Coal Company was not a defendant in this antitrust conspiracy case as of the time of trial. A stipulation to dismiss it as a defendant had been entered into by plaintiffs. This left

(Continued on following page)

[fol. 16] The District Judge's findings on these issues included:

1) "[P]icketing and violence are not per se evidence of a Sherman Act conspiracy. Thus the strike, ratified by the U.M.W., and picketing, to the extent that it received U.M.W. approval, and not the violence unconnected upon the record with the U.M.W., may be looked to as they may or may not demonstrate the purpose of the U.M.W. to conspire with others to impose the National Bituminous Coal Wage Agreement upon the Southeastern Tennessee coal field. The record in this regard fails to show any direct evidence of a Sherman Act conspiracy. Whether such an inference can be drawn must depend upon a review of all of the evidence upon the present phase of the case, to be followed by a review of all of the evidence upon all phases of the case.

"Upon review of the evidence as it relates to the Southeastern Tennessee coal field and of the U.M.W.'s activities therein, the following conclusions appear to be clearly supported by the evidence:

"(1) To operate successfully the producers in the Southeastern Tennessee coal field must be able to compete and survive on the T.V.A. coal market. Since 1954 50% or more of all coal produced in the State of Tennessee has had to find its market with the T.V.A. That figure reached as high as 78% in 1956 and by 1962 was still at 64.3%.

(Continued from preceding page)

the UMW as the only target of this suit alleging an antitrust conspiracy to drive the BCOA's competition out of business. While this fact alone does not justify dismissal of the suit against the UMW, it does seem to cast doubt upon the good faith of the predatory intent aspect of plaintiff's case.

"(2) Due to the geological conditions, the Southeastern Tennessee coal field cannot achieve a level of productivity equivalent to that of its principal competitors on the T.V.A. coal market. This competitive disadvantage is offset in part by the transportation and quality advantages which the field has over its principal competitors in the T.V.A. market at the Widow's Creek steam plant.

[fol. 17]

"(3) In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the T.V.A. coal market under the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to antiquated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business.

"Further than this the Court cannot go. Clear proof does not appear, either directly or by inference, that the U.M.W. acted other than unilaterally in furtherance of its own interests and purposes in its activities in the Southeastern Tennessee coal field in the period here under review. In this regard the plaintiffs rely upon the defendant's advocacy of mechanization as a solution to the operators' competitive difficulties as one element of proof demonstrating a conspiracy, in that the U.M.W. was in fact attempting to force mechanization upon a coal field which it knew to be unsuited

by geology therefor and at a rate that the U.M.W. knew was impossible for all but the largest coal operators in the nation. This contention does not appear to accord with the evidence. In the first place, it does not appear that mechanization would be ineffective in rendering the Southeastern Tennessee coal field competitive. Both Allen & Garcia and Grundy Mining Company appear to have been well on the way toward raising productivity to competitive levels by mechanization when their efforts were thwarted or halted by seniority and strike difficulties. In the second place, it does not appear that mechanization is beyond the economic capacity of all but the larger producers on the national scene." *Ramsey v. United Mine Workers of America*, 265 F.Supp. 388, 430 (E.D. Tenn. 1967).

[fol. 18]

* * *

"Reviewing the evidence as a whole in this light, the Court is unable to find that the evidence clearly reflects that the plaintiffs were the victims of any conspiracy between the U.M.W. and any coal operators or other non-labor organization to eliminate or suppress competition in the coal industry or to eliminate or suppress the production and sale of coal by the plaintiffs. While many inferences favorable to the plaintiffs' contentions can reasonably be drawn from the evidence, in every instance a no less equally reasonable inference can be drawn to the contrary. The latter, when coupled with the positive denial by many witnesses of any conspiracy, as well as other inferences favorable only to the defendant's contentions, do not permit a finding based upon clear proof of an antitrust conspiracy." 265 F.Supp., *supra* at 432.

2) "The seam of coal in the Southeastern Tennessee coal field, called the Sewanee seam, is located in a mountainous area of the State at an elevation of approximately 1800 feet. It is a rather high grade metalurgical coal. That is, it is usable for making coke for metalurgical purposes. However, the field has certain geological disadvantages. The principal of these is the thinness of the seam. The average thickness of the Sewanee seam appears to vary from 36 to 42 inches, but the seam is highly irregular in this respect. The seam is subject to squeezes and rolls in a very irregular and unpredictable manner; that is, the thickness of the seam varies and these conditions have no pattern. The seam may in one place be squeezed to a matter of a few inches in thickness or may be entirely pinched out by rock. In other places the coal may be
[fol. 19] rolled into a thickness up to six feet. Hazardous roof conditions are often encountered, especially in the areas of the rolls. The topography of the area is largely mountainous. Accordingly, most mining must be done underground, and the field does not lend itself to strip mining due to excessive overburden except in limited areas.

"These geological conditions place the Southeastern Tennessee coal field at a disadvantage with many other coal fields. For example, whereas only 32% of the coal produced in Tennessee is produced from seams over four feet thick, 65% of the coal comes from seams over four feet thick in the United States as a whole. The irregular nature of the seam, its thinness and difficult roof conditions all pose problems for mechanization.

"Geological conditions are among the matters claimed by the plaintiffs as rendering application of the National Bituminous Coal Wage Agreement to this field economically impossible, and therefore demonstrating the conspiratorial purpose of the U.M.W. in disregarding these conditions and seeking to force the national contract upon the field. This can more appropriately be evaluated after development of the history of the field in its relations with the U.M.W. Suffice it to say at this time that geological conditions have of course been a factor in competition with other coal producing areas and had their effect upon mining practices followed in the Southeastern Tennessee field. However, other conditions largely unrelated to geological conditions have likewise played a part. These include management policies, a general undercapitalization throughout the field, the pyramiding of leases, the nature of the T.V.A. coal market, labor practices and attitudes upon the part of workers and collective bargaining as practiced in the field." 265 F.Supp., *supra* at 424.

3) "Turning first to the activity of West Kentucky (and Nashville) upon the T.V.A. spot market, [fol. 20] it is the contention of the plaintiffs that these companies dumped extraordinarily large quantities of coal upon the spot market at steadily declining prices, particularly during the period from 1956 through 1958, forcing the price from 21.37¢ per million b.t.u. in 1956 down to 16.50¢ per million b.t.u. in 1958. (In translating a b.t.u. price to a tonnage price, the quality of coal is a significant factor. However, on the average one cent per million b.t.u. is equal to approximately 25¢ per ton on a tonnage price basis.) The evidence does not sustain the plaintiffs' charge. Although West Kentucky bid in 1956, its bid

in each instance was well above the market and it did not receive a single award. An analysis of the bids in 1957 and 1958 reveals that West Kentucky bid 22 times on the spot market, but received only five awards, these successful bids all being from Nashville Coal Company's Uniontown mine to the T.V.A. Shawnee steam plant. In not a single instance was West Kentucky the low bidder. In the first eight bids it was unsuccessful. On the ninth bid it got an award, but was the highest successful bidder. Its 10th, 11th and 12th bids were unsuccessful. Its 13th bid was successful, but again it was the highest successful bidder. Its 14th and 15th bids were unsuccessful. Its 16th and 17th bids were bid at the same price as the 14th and 15th bids, and were successful this time. In the 16th bid it was the highest successful bidder and in the 17th there were several lower bids. The 18th and 19th bids, at the same price as the four previous bids, were unsuccessful. The 20th bid was successful but was the second highest offer and there were no unsuccessful bidders on this solicitation. The 21st bid, at the same price was unsuccessful. The 22nd bid was successful, but only by .02 mils per million b.t.u." 265 F.Supp., *supra* at 419.

* * *

"The following table is reconstructed from the record and reflects the bidding of West Kentucky on the T.V.A. term coal market in the period from 1959 through 1963:

[fol. 21] Appendix A

Date of Bid	T.V.A. Requisition #	Price Per Ton (f.o.b.) mine)	Evaluated Relation to Other Bids	Award Made
7/27/59	27	$2.90	4th from lowest	T-3
2/ 9/60	32	$2.90	19th from lowest	None
9/ 1/60	35	$3.00	5th from lowest	None
2/14/61	37	$2.90	3rd from lowest	T-24
9/18/62	41	$2.90	7th from lowest	T-18
1/15/63	42	$2.90	3rd from lowest	None
6/19/63	43	$2.90	2nd from lowest	None
10/15/63	44	$2.90	Low bid	T-6

"While the above table does not reflect the fact that the bid evaluations, due to transportation costs, varied from one steam plant to another, the evaluations used were either those upon which an award was made, or in event West Kentucky was unsuccessful in its bid, upon the evaluation most favorable to the plaintiffs. In only one instance was West Kentucky the low bidder and this was at the Gallatin plant where it enjoyed a transportation advantage. At the Widow's Creek plant West Kentucky was never closer than third from the lowest bidder, and this was only after the Section 22 freight rate reduction had been placed into effect.

"In this regard the plaintiffs sought to substantiate their conspiracy claim by reference to a freight rate reduction granted by the Interstate Commerce Commission in 1960 under Section 22 of the relevant statute. In that year The Louisville and Nashville Railroad Company and the Tennessee Valley Authority joined in requesting a rate reduction of railway freight rates for hauling coal from the western area of Kentucky to the Widow's Creek steam plant, the request being to reduce this rate from $2.40 per ton to $1.60 or $1.40 per ton, depending upon the volume hauled. This reduction was opposed by coal operators in the Southeastern Tennes-

see coal field. The reduction was granted by the Interstate Commerce Commission. There is no evidence that this had any relation to any conspiracy involving either the U.M.W. or West Kentucky Coal
[fol. 22] Company. In any event, since it involves an appeal to a governmental agency, it could not involve a Sherman Act violation. *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L.Ed.2d 626, 86 S. Ct. 1585.

"The Court concludes that the evidence fails to establish that West Kentucky Coal Company or its subsidiary, Nashville Coal Company, engaged in predatory pricing of coal upon the T.V.A. market. It rather appears that West Kentucky and Nashville based their prices upon legitimate business considerations and were attempting at all times to meet competition, rather than lead the market downward. Having so concluded, it becomes unnecessary to consider further the responsibility of the U.M.W., if any, for West Kentucky and Nashville's coal pricing policies." 265 F.Supp., *supra* at 422. (Footnote omitted.)

There is ample evidence in this record to support these findings; and we certainly cannot hold them to be "clearly erroneous." FED. R. CIV. P. 52(a).

As indicated at the outset, the judgments of the District Court are affirmed by an equally divided vote in this court.

O'SULLIVAN, Circuit Judge, with whom Judges WEICK, CELEBREZZE and McCREE concur.

The question of law which divides us in this case is whether Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, requires that all elements of a cause of action for

antitrust violation must be made out by "clear proof" where a labor union is a defendant, as my brother Edwards holds, or whether the "clear proof" standard of Section 6 is limited to the determination of the authority of "individual officers, members, or agents" to act for a labor union or other organization, as I contend. Such Section 6 of Norris-LaGuardia provides:

[fol. 23] "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

This is plain language which, in my view, clearly exposes the Section's limitation. While not controlling, this is the meaning of the Section as it appeared to the compilers. The black letter title of the Section reads:

"Responsibility of officers and members of associations or their organizations for unlawful acts of indivudual officers, members, and agents."

The chief assertion of the opinion for affirmance is that in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the United States Supreme Court announced a rule that Section 6 of the Norris-LaGuardia Act controls the standard of proof as *to all issues* in any antitrust action against a labor union. That it did not do so is, in my view, made clear by the fact that nowhere in the opinions filed in that case (by Justices White, Douglas and Goldberg) is Section 6 of the Norris-LaGuardia Act *even mentioned or discussed*.

The opinion for affirmance places subsidiary reliance on *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947). *Gibbs*, however, had nothing to do with an antitrust action and considered only the question of a union's authorization of acts of violence committed by its members. *Carpenters* was a criminal case which considered Section 6 of Norris-LaGuardia only in dealing with the authority of an agent to act for a principal, whether that principal was a labor union *or an employer*. It did not construe Section 6 of Norris-LaGuardia as providing a special rule for labor unions. In this case the District Judge [fol. 24] apparently considered that such a special rule existed. He said:

> "Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U.M.W. did so impliedly agree. However, the standard of proof *where a labor union is involved* is 'clear proof,' as required by Section 6 of the Norris-LaGuardia Act, a standard different from the ordinary civil burden of persuasion." *Ramsey v. United Mine Workers*, 265 F.Supp. 388, 412 (E.D. Tenn. 1967). (Emphasis supplied.)

Such also was District Judge Taylor's view in *Lewis v. Pennington*, 257 F.Supp. 815 (E.D. Tenn. 1966), *aff'd* 400 F(2) 806 (6th Cir. 1968), *cert. denied* 393 U.S. 983 (1968).

> "It seems apparent that the Court in the Gibbs case by interpretation of the statute [Section 6 of Norris-LaGuardia] has placed a heavier burden of proof upon a plaintiff *in this type of case*." 257 F.Supp. at 829. (Emphasis supplied.)

Carpenters clearly limits the "clear proof" rule to the matter of proving the authority of an alleged agent. I consider that these District Court opinions, as well as the opinion of my brothers here, fail to properly limit the "clear proof" rule as in *Carpenters*.

Plaintiffs-appellants are, or were, coal mining companies operating in southeastern Tennessee. They appeal from a judgment of the United States District Court for the Eastern District of Tennessee, Southern Division, which dismissed their joint action against the United Mine Workers of America, defendant-appellee. Plaintiffs' action sought damages claimed to have been suffered by them as a consequence of alleged violations by the United Mine Workers of Section 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. This is the one of the many lawsuits that have grown out of the substantially [fol. 25] successful organization by the UMW of coal mining operations in the southeastern part of Tennessee. Plaintiffs charge that the United Mine Workers had long sought to forbid anyone from carrying on coal mining in the involved territory except those who would pay the wages and meet other conditions imposed by the United Mine Workers. It is their claim that this objective was ultimately accomplished by an illegal combination and conspiracy between a few big coal companies, who formed the Bituminous Coal Operators Association, and the United Mine Workers. Appellants further assert that the plan of the conspiracy was that only those who signed and adhered to the terms of a contract identified as the National Bituminous Coal Wage Agreement of 1950 and its 1958 supplement, the Protective Wage Clause,[1]

[1] The National Bituminous Coal Wage Agreement set out the wages to be paid and the other working conditions applicable to the mining of coal in the region involved. The Protective Wage Clause provided:

(Continued on following page)

would be permitted to carry on coal mining in southeastern Tennessee. It is claimed that the terms of these illegal undertakings were, when needed, implemented by violence visited upon anyone, including the plaintiffs, who essayed to operate independently. Success ultimately marked the United Mine Workers' campaign. We need not here consider the good or evil of the economic and social philosophy which holds that only those industries which, by size and profits, are able to pay wages that are considered adequate by the Unions of their employees, are fit to survive in today's economy.

The history of which this lawsuit is a part will be better learned by reading the District Court opinion in this case, reported as *Ramsey v. United Mine Workers*, [fol. 26] 265 F. Supp. 388 (E.D. Tenn. 1967), and the opinions in related cases: *Pennington v. United Mine Workers*, 325 F(2) 804 (6th Cir. 1963); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Lewis v. Pennington*, 257 F. Supp. 815 (E.D. Tenn. 1966); and *Lewis v. Pennington*, 400 F(2) 806 (6th Cir. 1968), *cert. denied*, 393 U.S. 983 (1968). The above-mentioned opinions and related opinions shall be referred to herein as *Pennington* I, II, III and IV, respectively. All of these refer to an action by Pennington and others against the United Mine Workers to recover damages for the claimed Mine Workers' violation of the Sherman Antitrust Act.

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"During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or on any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

Pennington I was our affirmance of a District Court judgment entered upon a jury verdict which found the Mine Workers guilty of such violation. *Pennington* II was the Supreme Court's reversal of *Pennington* I, remanding the case for a new trial. *Pennington* III was a District Court judgment, entered after trial upon the remand, and *Pennington* IV is this Court's affirmance in part and reversal in part of *Pennington* III.

In the case at bar, the District Judge, in dismissing plaintiffs' action, held that although plaintiffs had made out a case of the Mine Workers' violation of the antitrust laws *by a preponderance of the evidence*, a labor union cannot be convicted of such violation except by the "clear proof" rule of Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106.[2] Testing the sufficiency of plaintiffs' proofs by such rule, he exonerated the Mine Workers of liability. We consider that such ruling was the product of the District Judge's misreading and misapplication of two Supreme Court decisions, viz: *United Mine Workers v. Gibbs*, 383 U.S. 715 16 L. Ed. (2d) 218 (1966); and *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 91 L. Ed. 973 (1947). He concluded that these cases announced a rule that labor unions, as distinguished from all others who might be so accused, cannot be convicted of violation of the Sherman Act unless such violation be established by the so-called "clear proof" rule of Norris-LaGuardia. We would reverse.

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[2] "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon **clear** proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (Emphasis supplied.)

It is clear that had the District Judge considered that the ordinary preponderance of the evidence rule applied, he would have found that the United Mine Workers were guilty of Sherman Act violations. The critical question was whether the United Mine Workers and the Bituminous Coal Operators Association had *agreed* to control wages and working conditions. On this, the District Judge said:

> "Having concluded that the Protective Wage Clause does not constitute an *express* commitment upon the part of the U.M.W. to the B.C.O.A. not to bargain with any other coal operator upon any terms other than the national contract, this does not conclude the issue of whether the U.M.W. did *in fact*, though not expressly, so contract with the B.C.O.A. *Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U.M.W. did so impliedly agree.* However, the standard of proof where a labor union is involved is 'clear proof', as required by Section 6 of the Norris-LaGuardia Act, a standard different from the ordinary civil burden of persuasion. United Brotherhood of Carpenters v. United States, 330 U.S. 395, 67 S. Ct. 775, 91 L. Ed. 973; United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. (2) 218." 265 F. Supp. at 412. (Emphasis supplied.)[3]

In *Pennington v. United Mine Workers*, 325 F(2) 804 (6th Cir. 1963)—*Pennington I*—this Court affirmed a judgment, entered upon a jury verdict, finding the United Mine Workers guilty of violating the Sherman Act. The jury awarded plaintiff $90,000 damages, which sum was trebled by the District Court. As will be discussed later

[3] We should make it clear that we need not and do not reach consideration of whether the District Judge's findings were "clearly erroneous." We hold only that the "clear proof" standard which the Judge applied in making his findings was improper.

herein, the District Judge had advised the jury that plaintiffs' burden was to make out their case by a *preponderance of the evidence*. In our affirmance, we followed the United States Supreme Court's holding in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 89 L. Ed. 1939 (1945), that the exemption granted labor unions from the provisions of the Sherman Act by Section 6 of the Clayton Act, 15 U.S.C. § 17,

> "does not exist in cases where a labor union combines with a non-labor organization to restrain competition in, or to monopolize the marketing of goods in interstate commerce." 325 F(2) at 809.

While we cannot say that the facts of *Pennington* I parallel the case at bar in all respects, we are satisfied that the plaintiffs' evidence in that case did not portray with more probative force a violation of the Sherman Act than does the record here. We there held that United Mine Workers were not entitled to a directed verdict and that there was sufficient evidence to permit the jury to find that the United Mine Workers had, to the damage of the plaintiffs — a group of small mine operators — violated the Sherman Act. We affirmed the judgment which was entered on the verdict.

The United States Supreme Court reversed us, *Mine Workers v. Pennington*, 381 U.S. 657 (1965) — *Pennington* II — *not, however, on the ground* that a case of violation of the Sherman Act had not been made out, but remanded for a new trial because of some instructions which the Supreme Court held should not have been given. The criticized instructions had nothing to do with the standard of proof which governed plaintiffs' burden. They affirmed our holding that Pennington, *et al.*, had made out a case

[fol. 29] to go to the jury. This is made plain by the Court's disposition of the Mine Workers' claim that a verdict should have been directed.

> "We first consider UMW's contention that the trial court erred in denying its motion for a directed verdict and for judgment notwithstanding the verdict, since a determination in UMW's favor on this issue would finally resolve the controversy. The question presented by this phase of the case is whether *in the circumstances of this case the union is exempt from liability under the antitrust laws*. We think the answer is clearly in the negative and that the union's motions were correctly denied." 381 U.S. at 661. (Emphasis supplied.)

Therefore, we consider that the Supreme Court has said that the evidence in the case at bar —legally equivalent to *Pennington*—would permit a factfinder —jury or judge —find the United Mine Workers guilty of violating the Sherman Act. The accused agreement here, as well as in *Pennington* I, was the so-called National Bituminous Coal Wage Agreement, with the 1958 addition to it of the Protective Wage Clauses under which (as charged by plaintiff) "the Union bound itself not to enter into, be a party to, or permit any other kind of labor contract in the industry except the National Agreement which it signed with Bituminous Coal Operators Association." *Lewis v. Pennington*, 257 F. Supp. at 820.

In *Pennington* I, the charge of antitrust violation against the Mine Workers was made in the cross-complaint of Pennington, *et al*. In his general submission of the case to the jury, the District Judge charged that,

> "before it [the cross-complainant] can recover on its cross-claim, it is required to make out its case sub-

stantially as alleged in the cross-claim by a *preponderance of the evidence* * * *. In order to recover * * * upon the conspiracy, Phillips Brothers [Pennington] must show *by a preponderance of the evidence* that the conspiracy * * * existed during the [fol. 30] period of the case * * *. The burden of proof and *the preponderance of the evidence* ordinarily have reference to direct evidence and indirect or circumstantial evidence. * * * Indirect evidence is that knowledge that is inferred from known facts."[4] (Emphasis supplied.)

It should be noted that in the Mine Workers appeal from the verdict in *Pennington* I, none of its five Questions Involved attacked the style of the above instruction. They did question the instructions which the Supreme Court found erroneous, but those did not relate to standard of proof. In their appeal to us, in urging that a verdict should have been directed for insufficient proof, the Mine Workers contended that Section 6 of Norris-LaGuardia should have been applied in testing whether there was any sufficient evidence to allow the jury to find the Mine Workers guilty of Sherman Act violations. In our opinion in *Pennington* I, 325 F(2) 804, we rejected such contention by finding that the District Judge correctly submitted the

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[4] It should be mentioned that the District Judge did instruct the jury that "clear proof" was required in the jury's consideration of whether particular acts of union members had been authorized by the United Mine Workers. He instructed the jury as follows:

"Similarly, unions act through their officers, agents, employees and members and no union participating or interested in a labor dispute may be held responsible or liable in any court of the United States for the unlawful acts of individual officer, members or agents, except upon clear proof of actual participation in, or actual authorization of, such act, or of ratification of such acts after actual knowledge thereof."

This was a correct charge upon the limited application of Norris-LaGuardia, Section 6.

case to the jury and by sustaining the District Judge's denial of the Mine Workers' motion for new trial which, *inter alia*, again asserted that Section 6 of Norris-La-Guardia was the controlling rule.

In their brief to this Court in *Pennington* I, the Mine Workers asserted:

[fol. 31] "As already observed, Phillips' [Pennington] burden was not only to prove the unlawful conspiracy but, as the trial court charged, to prove it by 'clear proof'.[5] Not only is 'clear proof' lacking, there is absolutely no proof whatsoever."

In their petition to the Supreme Court for writ of certiorari to review *Pennington* I, the United Mine Workers included in its Questions Presented the following:

"Where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act when it executed an industry-wide, multi-employer collective bargaining agreement in conformity with injunctive orders of a federal district court, union denials of the conspiracy are uncontradicted, and there is no direct evidence proving the conspiracy, may a court or jury infer the existence of a conspiracy from union activities either sanctioned under law or within the jurisdiction of the National Labor Relations Board, *in light of the antitrust immunity of labor unions and the clear proof requirement of Section 6 of the Norris-La-Guardia Act* ?" (Emphasis supplied.)

We read the Supreme Court's holding in *Pennington* II, as rejecting the assertion presented by that question.

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[5] As set out earlier, the District Judge, in his instruction as to "clear proof," correctly limited application of such rule to the matter of authorization of acts by agents, etc.

District Judge Taylor's opinion upon retrial — *Pennington* III — was the first announcement by any court that labor unions are insulated from liability under the Sherman Act unless their violations are made out by the "clear proof" standard of Norris-LaGuardia. He stated:

> "The standard of proof necessary to show predatory intent is governed by the recent decision of the Supreme Court in *United Mine Workers of America v. Gibbs*, (C.A. 6, March 28, 1966), 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218." 257 F. Supp. at 829. (Emphasis supplied.)

[fol. 32] and further that:

> "It seems apparent that the Court in the *Gibbs* case by interpretation of the statute, has placed a heavier burden of proof upon a plaintiff *in this type of case*." 257 F. Supp. at 829. (Emphasis supplied.)

The quotations from Justices Brennan and Harlan set out by Judge Taylor immediately preceding the above are both from the *Gibbs* case. Judge Taylor did not cite the Supreme Court opinion in *Pennington* II as support for the new "clear proof" rule that he announced. His reliance was on *Gibbs*, but the *Gibbs* case *had nothing whatever to do with the Sherman Act or the Clayton Act*.

Gibbs had sued the United Mine Workers and recovered damages for secondary boycott and a state common law tort. The relevant question was whether UMW could be held liable for violence committed by some of its members in stopping Gibbs' effort to begin a mining operation. The Supreme Court merely held that Section 6 of the Norris-LaGuardia Act required Gibbs to make "clear proof" that the UMW had authorized, approved or ratified the violence. This is the case's holding:

"What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force." 383 U.S. at 739.

It found that Gibbs' evidence did not, by "clear proof," establish the union's authorization of or participation in the violence committed. In the case at bar, except as to responsibility for violence, there was no issue as to whether what was done by the Mine Workers' officers or agents had the approval of the union. No such question was raised. The National Bituminous Coal Wage [fol. 33] Agreement and the 1958 Protective Wage Clause made between the Bituminous Coal Operators Association and the United Mine Workers were admittedly executed by the proper authorities of the union and Norris-LaGuardia was in no way involved in these critical matters.

The application of the Norris-LaGuardia "clear proof" rule as the standard of proof in Sherman Act suits against labor unions had its genesis in *Lewis v. Pennington*, 257 F. Supp. 815 (*Pennington* III). A reading of the opinion of Judge Taylor in that case will disclose that he did not rely upon the Supreme Court's opinion in *Pennington* II for the rule he announced—*Gibbs* was his authority. The first intimation that the Supreme Court's opinion in *Pennington* II contained such a rule came in Judge Wilson's opinion in the case at bar and in this Court's opinion in *Pennington* IV, 400 F(2) 806 (1968), affirming Judge Taylor's *Pennington* III. Our opinion in that case emphasizes the words "clearly shown" in quoting from one of the sentences in Mr. Justice White's *Pennington* II opinion, where he said:

"'But we think a union forfeits its exemption from the antitrust laws when it is *clearly shown* that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.' 381 U.S. at 665. (Footnote omitted; emphasis added.)" 400 F(2) at 813.

This is followed by this Court's language:

"We thus understand *Pennington* to teach that:

"1) a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act;

"2) 'predatory intent' (as used by Mr. Justice White (381 U.S. at 668) and by Judge Taylor) is merely shorthand employed to describe this anti-competitive conspiracy; and

[fol. 34] "3) such an anti-competitive conspiracy must be established by 'clear proof'. See also *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

"While the jury by its verdict in the first trial of this case had found a conspiracy between the UMW and large mine operators to put smaller mine operators out of business by a preponderance of the evidence, Judge Taylor found such a conspiracy not to have been shown by 'clear proof' at the second trial. Judge Taylor properly concluded that a degree of proof less than the 'beyond a reasonable doubt' requirement in criminal cases but greater than the 'preponderance of the evidence' standard of civil actions is necessary, 257 F. Supp. at 829. The District Court's determination that judged by this standard evidence of sufficient probity had not been offered is supported by a review of the

record and is not clearly erroneous. Rule 52 F.R. Civ. P." 400 F(2) at 814.

We are not persuaded that the context of Mr. Justice White's use of the words "clearly shown" in the sentence quoted justifies their being read as announcing a new rule giving labor unions special treatment in defending suits under the Sherman Act. The concurring opinion of Mr. Justice Douglas, joined by Mr. Justice Black and Mr. Justice Clark, does not even discuss the subject. Neither does Mr. Justice Goldberg, who was joined by Mr. Justice Harlan and Mr. Justice Stewart in dissenting from *Pennington* II.

That the words "clearly shown" were not employed by Justice White to announce the rule claimed by Judge Taylor in *Pennington* II and by Judge Wilson in this case is made clear by the fact that neither in Justice White's opinion nor in any of the others in *Pennington* II is Section 6 of Norris-LaGuardia even mentioned. It is that statute which is the sole basis for the claim that "clear proof" is the standard applicable to the burden of proving all elements of a labor union's violation of the Sherman Act.

fol. 35] Congress has been attentive to the needs of organized labor. Lest, in serving their own ends, labor unions be swept into the prohibitions of the Sherman Act, the Clayton Act came into being in 1914 to protect the unilateral activities of a labor union from antitrust condemnation. The Supreme Court's opinion in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), however, forbade labor unions from joining hands with management in conduct proscribed by the Sherman Act. The Norris-LaGuardia Act was enacted in 1932 as a restraint upon the then-increasing intrusions of federal

court injunctions into genuine labor disputes; its Section 6 (29 U.S.C. § 106) provided that the participants in labor disputes, whether employer or a union of employees, could not be cast in damages, or be made otherwise liable for unlawful acts of their agents, except by *clear proof* of the authority of such agents to act for their principals. The "clear proof" rule was created by Congressional Act, with clear definition of its limited application. We are not at liberty to do violence to its plain language by reading into it new and special antitrust insulation of labor unions not contained in the exemption granted them by the Clayton Act. Certainly the *Gibbs* case did not do so, and we are not persuaded that two words included in a general observation by one of the Justices in *Pennington* II did so.

Judge Wilson specifically found that, *by preponderance of the evidence*, plaintiffs had established that the joint action of the BCOA and the Mine Workers in entering into and using the National Bituminous Coal Wage Agreement with its Protective Wage Clause, and the implementing of them, established an agreement violating the Sherman Act. While he did not express himself as to how he would have found as to all of the other issues of fact had he adhered to the traditional preponderance of evidence rule, he made it plain that he followed the "clear proof" rule in passing on responsibility for violent conduct by agents or members of the union. The *Gibbs* rule was correctly applied to that issue.

[fol. 36] The other case relied upon to support the "clear proof" rule was *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 91 L. Ed. 973 (1947). In that criminal case, unincorporated trade unions and their officials were alleged to have conspired with some manufacturers and dealers and their incor-

porated trade associations to monopolize and restrain trade in the manufacture of and dealing in, millwork and patterned lumber. The only holding relevant to the Norris-LaGuardia Act was that, wherein the government sought to hold the involved trade associations or parent unions responsible for acts done by their individual officers, members, or local unions, the authority to so act for their principals had to be made out by clear proof. This is the totality of the case's relevant holding:

> "We hold that its [Section 6 of the Norris-LaGuardia Act] purpose and effect was to relieve organizations, *whether of labor or capital*, and members of those organizations from liability for damages or imputations of guilt for lawless acts done in labor disputes *by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.*" 330 U.S. at 403. (Emphasis supplied.)

This, indeed, is not a holding that the "clear proof" rule has, in antitrust cases against labor unions, replaced the substantive rule of preponderance of the evidence. The Supreme Court in *Carpenters* was careful to express the limit of the rule:

> "There is no implication in what we have said that an association or organization in circumstances covered by §6 [Norris-LaGuardia] must give explicit authority to its officers or agents *to violate in a labor controversy the Sherman Act* or any other law or to give antecedent approval to any act that its officers may do." 330 U.S. at 409-410. (Emphasis supplied.)

[fol. 37] Had adherence to or establishment of a rule that plaintiffs had to establish their entire case by the "clear proof" of Norris-LaGuardia been decisive of our *Pennington* IV, *stare decisis* would forbid this early a departure from it. But the adoption or approval of such a rule was dictum in Judge Taylor's opinion and in our affirmance.[6] He concluded his finding on Sherman Act violation as follows:

> "The Court is of the opinion and finds that plaintiffs have failed to prove, *either by a preponderance of the evidence* or by the standards of evidence established by the Supreme Court in UMW v. Gibbs, supra, that the defendant engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged in the complaint. In this connection, *the Court observes that the extensive evidence introduced by plaintiffs of violence in the coal fields is consistent with the Union's determination to unionize the units of the entire area*, and, in the light of the Court's conclusion just noted, is insufficient to show a Sherman Act antitrust violation." 257 F. Supp. at 864. (Emphasis supplied.)

Thus, it is clear that Judge Taylor's exoneration of the Mine Workers was not dependent upon application of the clear proof rule of Norris-LaGuardia. He found that plaintiffs had not made out a case under the [fol. 38] traditional rule of *preponderance of the evidence*.

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[6] We should mention that although Judge Taylor found no Sherman Act violation in **Pennington** III, he gave judgment to two plaintiffs for $311,787 as compensatory and punitive damages for the Mine Workers' depredations against these small mine operators in its drive to put out of business any operator attempting to carry on without signing the Uniform National Bituminous Coal Wage Agreement. He held the conduct violative of the law of Tennessee. This Court's latest **Pennington** decision, **Pennington** IV, remanded the case to the District Court for reconsideration and more specific findings concerning the award of damages for the United Mine Workers' violation of Tennessee law.

Appendix A

Plaintiffs' evidence in this case generously portrayed how propitious was the setting for the victory achieved by the BCOA and the Mine Workers in implementing their agreement. The District Court opinion at length sets out the relevant facts. Among other things, it was shown that the Mine Workers loaned to one Cyrus Eaton some $25,000,000 to enable him to acquire *for them* control of the capital shares of West Kentucky Coal Company—the biggest of the members of BCOA—and its subsidiary, Nashville Coal Company. By having Eaton so invest the union's money, the Mine Workers acquired the voting rights of West Kentucky Coal Company and Eaton became Chairman of the Board, and:

> "Immediately after Mr. Eaton assumed control, West Kentucky signed the National Bituminous Coal Wage Agreement, the first time in its history that it had signed a contract with the U.M.W." 265 F. Supp. at 414.

Judge Wilson further observed:

> "Furthermore, the reasons for which loans and investments were made in West Kentucky and its subsidiary, Nashville Coal Company, must likewise largely be inferred, *as the reasons given by the U.M.W. for doing so will not bear scrutiny*." 265 F. Supp. at 414. (Emphasis supplied.)

It would indeed be over kind to accord credence to the asserted claim that the making of the National Bituminous Coal Wage Agreement and the Protective Wage Clause between the United Mine Workers and their controlled West Kentucky Coal Company was an "arm's length" transaction, free of conspiratorial and predatory purpose. The Mine Workers lost eight of the twenty-five million dollars

which it invested in the management side of the accused transactions. For its victory, it was apparently willing to pay this bill as well as the many hundreds [fol. 39] of thousands of dollars which it paid for the depredations and violence—the reign of terror—which it employed in driving out of coal mining those who could not live with the terms of the National Bituminous Wage Agreement. See *Flame Coal Co. v. United Mine Workers*, 303 F(2) 39 (6th Cir. 1962); *United Mine Workers v. Osborne Milling Co.*, 279 F(2) 716 (6th Cir. 1960), *cert. denied*, 364 U.S. 881 (1960); *Gilchrist v. United Mine Workers*, 290 F(2) 36 (6th Cir. 1961). District Judge Wilson described the Mine Workers' conduct in this language:

> "The evidence in this case reflects once again that the 'history of the bituminous coal industry is written in blood as well as ink.' Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263." 265 F. Supp. at 428.

and further,

> "A great deal of violence, bloodshed and destruction of property has accompanied the strike [discussed in the opinion]. Much suffering, deprivation and want has occurred. The Southeastern Tennessee coal field remains a blighted area." 265 F. Supp. at 428.

He sums up the situation as follows:

> "In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the T.V.A. coal market under the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to anti-

quated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the *only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business.*" 265 F. Supp. at 430. (Emphasis supplied.)

[fol. 40] There is nothing in the record of this case to suggest that the conception and prosecution of the grand plan we deal with was the work of irresponsible underlings. The total enterprise was directed from high echelons of authority. Top people of the United Mine Workers and the Bituminous Coal Operators Association did not need the protection of Norris-LaGuardia when they negotiated and signed the National Bituminous Coal Wage Agreement and its Protective Wage Clause, nor when the Mine Workers invested $25,000,000 to aid the big coal companies to fulfill the promise of the plan.

Peace has indeed come to Southeastern Tennessee's part of Appalachia, but it is the peace of obedience to the overlords of big business and big labor. Of this situation, Mr. Justice Douglas, in his *Pennington* concurrence, appropriately observes:

> "Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced. Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system." 381 U.S. at 674.

We would vacate the judgment of the District Court and remand the cause for further proceedings consistent herewith.

APPENDIX B

15 USCA:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: ***Provided***, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: ***Provided further***, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in

competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 17. ANTITRUST LAWS NOT APPLICABLE TO LABOR ORGANIZATIONS

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraints of trade, under the antitrust laws. Oct. 15, 1914, c. 323, §6, 38 Stat. 731.

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29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§52: STATUTORY RESTRICTION OF INJUNCTIVE RELIEF

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacfully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

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29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

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29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, §4, 4 Stat. 70.

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

Labor Management Relations Act, 1947 (29 USCA):

§ 141: SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, 3:17 p.m., E.D.T., c. 120, § 1, 61 Stat. 136.

§ 151: FINDINGS AND DECLARATION OF POLICY

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual

liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bar-

gaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 136.

§ 157. RIGHT OF EMPLOYEES AS TO ORGANIZATION, COLLECTIVE BARGAINING, ETC.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140.

§ 158. UNFAIR LABOR PRACTICES

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership

therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances:

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601.

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is ——

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to

cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception. As amended September 14, 1959; Pub. L. 86-257, Sec. 704(b).

* * *

§ 185. SUITS BY AND AGAINST LABOR ORGANIZATIONS —VENUE, AMOUNT, AND CITIZENSHIP

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction

of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(b) ... Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States .... June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 301, 61 Stat. 156.

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CHAPTER 21. — NATIONAL POLICY ON EMPLOYMENT

* * *

§ 1021. Declaration of policy

The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power. Feb. 20, 1946, c. 33, § 2, 60 Stat. 23.

§ 1022. Economic Report of the President; coverage; supplementary reports; reference to Congressional Joint Committee

(a) The President shall transmit to the Congress not later than January 20 of each year an economic report (hereinafter called the "Economic Report") setting forth (1) the levels of employment, production, and purchasing power obtaining in the United States and such levels needed to carry out the policy declared in section 1021 of this title; (2) current and foreseeable trends in the levels of employment, production, and purchasing power; (3) a review of the economic program of the Federal Government and a review of economic conditions affecting employment in the United States or any considerable portion thereof during the preceding year and of their effect upon employment, production, and purchasing power; and (4) a program for carrying out the policy declared in section 1021 of this title, together with such recommendations for legislation as he may deem necessary or desirable.

(b) The President may transmit from time to time to the Congress reports supplementary to the Economic Report, each of which shall include such supplementary or revised recommendations as he may deem necessary or desirable to achieve the policy declared in section 1021 of this title.

(c) The Economic Report, and all supplementary reports transmitted under subsection (b) of this section, shall, when transmitted to Congress, be referred to the joint committee created by section 1024 of this title. Feb. 20, 1946, c. 33, § 3, 60 Stat. 24; Aug. 2, 1946, c. 753, Title II, § 226, 60 Stat. 838; June 18, 1956, c. 399, § 1, 70 Stat. 289.

1024. Joint Economic Committee — Composition

(a) There is established a Joint Economic Committee, o be composed of ten Members of the Senate, to be appointed by the President of the Senate, and ten Members f the House of Representatives, to be appointed by the peaker of the House of Representatives. In each case, he majority party shall be represented by six Members nd the minority party shall be represented by four Members.

Functions

(b) It shall be the function of the joint committee —

(1) to make a continuing study of matters relating to he Economic Report;

(2) to study means of coordinating programs in order o further the policy of this chapter; and

(3) as a guide to the several committees of the Congress dealing with legislation relating to the Economic eport, not later than March 1 of each year (beginning ith the year 1947) to file a report with the Senate and he House of Representatives containing its findings and ecommendations with respect to each of the main recommendations made by the President in the Economic Report, nd from time to time to make such other reports and ecommendations to the Senate and House of Representaves as it deems advisable.

Vacancies; selection of chairman and vice chairman

(c) Vacancies in the membership of the joint committee hall not affect the power of the remaining members to xecute the functions of the joint committee, and shall be lled in the same manner as in the case of the original

selection. The joint committee shall select a chairman and a vice chairman from among its members.

* * *

Feb. 20, 1946, c. 33, § 5, 60 Stat. 25; Aug. 2, 1946, c. 753, Title II, § 225, 60 Stat. 838; Feb. 2, 1948, c. 42, 62 Stat. 16; Oct. 6, 1949, c. 627, §§ 1, 2, 63 Stat. 721; June 18, 1956, c. 399, § 2, 70 Stat. 290; Feb. 17, 1959, Pub. L. 86-1, 73 Stat. 3; Oct. 13, 1964, Pub. L. 88-661, 78 Stat. 1093; Jan. 25, 1967, Pub. L. 90-2, 81 Stat. 4.

APPENDIX C

PROTECTIVE WAGE CLAUSE

The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:

A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminious coal mined under terms and conditions

less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

"Procured or acquired under a subcontract arrangement" means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: Provided, however, that any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms.

The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained, shall be a direct and continuing obligation of said Operator during the life of this Agreement.

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Clause covers the operation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The said Operators agree that they will not lease, license, or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause.

C. There is hereby established a Joint Industry Contract Committee composed of six (6) members, three (3) of whom shall be appointed and may be removed by the Union and three (3) of whom shall be appointed and may be removed by the Operators. Such appointments shall be made and notice thereof given to the proper parties hereto as expeditiously as possible and not later than thirty (30) days after the date of the execution of this Contract. In the event of resignation, removal, death, inability or unwillingness to serve of any of the members of the Committee, the Union shall appoint the successor or successors of the members originally appointed by it and the Operators shall appoint the successor or successors of the members originally appointed by them. Action which may be required of the Operators for the appointment of any member of the Joint Industry Contract Committee representing them may be taken by those Operators who, at the time, are signatories hereto. Authorization, approval or ratification of Operators representing fifty-one (51) per cent or more of the coal produced for use or sale during the calendar year previous to that in which such action is taken shall be sufficient to bind all Operators.

The Joint Industry Contract Committee may appoint such Joint District Contract Committees in such districts or groups of districts as it may determine, such district committees to consist of such numbers of members, half of whom shall represent the Union and half of whom shall represent the Operators in that district or groups of districts, as the Industry Committee shall deem advisable. The Joint District Contract Committees shall assist the Joint Industry Contract Committee in making any investigations hereunder.

The Joint Industry Contract Committee and the Joint District Committees, when authorized by and under the supervision of the Industry Committee, may employ such clerical and other employees as are required for the performance of their duties hereunder. Expenses of all Committees shall be borne equally by the Union and the Operators.

D. Within one hundred and twenty days after the execution of this contract and each six months thereafter each Operator signatory hereto shall certify in writing to the Joint District Contract Committee for the District where he maintains his principal place of business where such a District Committee exists, or to the Joint Industry Contract Committee where no District Committee exists, that he is in full compliance with all the terms and conditions of this contract or any applicable District Agreement. Within one hundred and twenty days after the execution of this Agreement, and each six months thereafter each Union District President shall certify in writing to his Joint District Contract Committee, if one exists, or, if none exists, to the Joint Industry Contract Committee, a complete list of all Operators and Mines engaged in the production of bituminous coal within his district whose

operations are under contract with the Union. No operator may be found to be in violation of this Protective Wage Clause with respect to any coal produced by another operator who is listed on the Contract list to be furnished by United Mine Workers of America under this paragraph, unless and until such operator is notified in writing by the Joint Industry Contract Committee that such operator has failed to comply with the provisions of this Clause and such failure has not been corrected.

E. Any party signatory to this contract shall have the right at any time to file a complaint with the Joint Industry Contract Committee alleging a violation of any provision of this Protective Wage Clause. In the event such a charge is filed it shall be the duty of the Joint Industry Contract Committee to investigate and determine the facts with respect to such alleged violation. Any determination by the Joint Industry Committee that a violation of this Clause has occurred may be made only upon the concurrence therein of a majority of the membership of the Committee. Notice by the Committee to the affected party, opportunity for the party to be heard, and failure promptly to effect full compliance after a finding of violation by the Committee shall be deemed a condition precedent to any final determination that a violation of this Clause has occurred. Findings made by the Joint Committee, after notice and opportunity for hearing, shall be served upon all parties to the proceeding, and shall constitute a final determination as to the fact of a violation. Failure or refusal of United Mine Workers or any Operator signatory hereto to comply with a final determination by the Committee of a violation of Paragraphs (A) or (B) of this Clause may be deemed a violation of this Agreement.

The Mine Workers agree to make available to the Joint Industry Contract Committee all contracts, agreements,

or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal, and further agree to appear before the Committee on request by it and inform the Committee on such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause. Each Operator signatory hereto agrees to appear before the Committee on request by it and inform the Committee as to the source and quantity of coal produced or purchased or otherwise acquired, payment of wages to, and hours and working conditions of classified employees, payments to the United Mine Workers of America Welfare and Retirement Fund, and such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause.

The authority of the Committee is restricted to the subject matter covered in this Protective Wage Clause and shall not extend to disputes concerning the administration of the Contract which are of the type that have heretofore been processed under the grievance procedures provided for in the Section of the Contract entitled "Settlement of Local and District Disputes"; nor shall the provisions of this "Protective Wage Clause" be subject to the terms or conditions of the "Settlement of Local and District Disputes" section of this Contract.